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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 614

N. H. LYONS & CO., INC.,

Appellant,

against

ISADOR LUBIN, as Industrial Commissioner of the State of New York,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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MAY IT PLEASE THE COURT:

Appellee moves that the appeal herein be dismissed, or that the judgment appealed from be affirmed.

Challenged Statute, Wage Orders and Proceedings Below

Appellant challenges Section 663-a (formerly Section 563-a) of Article 19 of the Labor Law of the State of New York, on the ground that the statute is unconstitutional in violation of the Fourteenth Amendment to the United States Constitution (pp. 2, 3—Jurisdictional Statement).

Section 663-a reads as follows:

> "§ 663-a. SUPPLEMENTARY PROTECTION. To effectuate the aim of this article and to protect the minimum wage standards and rates provided for women and minors, no male twenty-one years of age or over shall be employed in an occupation at less than the minimum standards or rates of wages fixed for women and minors in such occupation under a minimum wage order. The provisions of sections six hundred sixty, six hundred sixty-two, six hundred sixty-three, six hundred sixty-four, and six hundred sixty-five of this article shall apply to any employer or his agent, or officer or agent of any corporation failing to comply with the provisions of this section or any minimum wage order."

Section 563-a (now Section 663-a) became effective on July 1, 1944. Effective July 17, 1944, and in accordance with the regular statutory procedure, Mandatory Minimum Wage Order Number 6, applicable to the hotel industry, was promulgated by the Industrial Commissioner (fol. 474).

Appellant's lodging establishments factually and by virtue of Section 663-a became subject to its terms.

Subsequent Minimum Wage Orders for the hotel industry, Number 6-a, effective November 30, 1947, Number 6-b, effective February 15, 1953, and Number 6-c, effective October 11, 1954, also became applicable to the appellant's lodging establishments.

The plaintiff-appellant, as owner and operator of a lodging house on the Bowery in the City of New York, by means of an amended complaint verified February 8, 1952, sued for a declaratory judgment and injunctive relief against the Industrial Commissioner of the State of New York, as defendant, contending that the defendant-respondent had attempted and was attempting to enforce Mandatory Minimum Wage Orders Number 6 and Number 6-a against

"lodging houses in the City of New York, including plaintiff's to the serious damage and injury of the plaintiff and persons similarly situated" (fols. 22, 30).

The amended complaint, verified February 8, 1952, asserted *inter alia* that the plaintiff-appellant employed no women or minors (fols. 21, 33) and therefore the men in its employ were not subject to the said minimum wage orders, in spite of the provisions of Section 663-a of the Labor Law, theretofore in effect on July 1, 1944, providing that "no male twenty-one years of age or over shall be employed in an occupation at less than the minimum standards or rates of wages fixed for women and minors in such occupation under a minimum wage order".

The amended complaint averred that the plaintiff-appellant had no adequate remedy at law (fol. 22). The answer to the amended complaint, verified April 15, 1952, in general denied the allegations of the amended complaint, and affirmatively alleged several separate and complete defenses (fol. 30-65).

Among these separate and complete defenses, the defendant-respondent asserted that the plaintiff-appellant had an ample remedy at law by applying to the Board of Standards and Appeals of the State of New York as provided in Article 3, Section 110, and Article 19, Section 662 of the Labor Law (fol. 61), that these provisions prescribed an automatic stay, that such remedy was exclusive for testing the legality of an order of the Industrial Commissioner (fol. 64), that the action for declaratory judgment and injunctive relief constituted an illegal collateral attack (fol. 63) and that the wage orders were not subject to an attack by such an action (fol. 62).

After the determination of certain preliminary motions, the amended complaint, verified February 8, 1952, was served. This new complaint in a large measure amplified the allegations and for the first time raised purported constitutional issues.

The trial was held on September 30, 1952, before Mr. Justice Carroll G. Walter, in the Supreme Court, County of New York, at Special Term without a jury (fol. 79). The amended complaint was dismissed upon the merits and judgment was entered November 3, 1952 (fol. 76).

The opinion of the Court is reported at 203 Misc. 160 (1952) (fol. 454). The decision for affirmance of the Appellate Division of the Supreme Court, First Judicial Department, is reported at 286 App. Div 1065 (1955) (fol. 493). No opinion was written by the Appellate Division. The opinion for affirmance of the Court of Appeals and the dissenting opinion of Van Voorhis, J., are reported at 3 N. Y. 2d 60 (1957). The Remittitur of the Court of Appeals, sought to be reviewed was dated May 24, 1957, and an Amended Remittitur of that Court was dated October 17, 1957.

A more detailed account of the background of minimum wage legislation, pertinent statutes and minimum wage orders is attached hereto as Appendix A and Appendix B.

In the main, before the trial court and the Appellate Division the appellant contended that its establishments were improperly classified within the scope of the hotel industry definition which had been incorporated in the minimum wage orders. It was not until the argument of the case in the Court of Appeals that a serious challenge was directed at the constitutionality of Section 663-a of the Labor Law.

The appellant evidently has abandoned its argument that Section 663-a and Article 19 of the Labor Law interfered with its rights of contract.

Factual Considerations

The appellant's amended complaint in the action seeking a declaratory judgment and injunction alleged that it was the owner and operator of a lodging house, known as

Eagle House, located at 25 Bowery, New York City (fol. 14), that the said establishment was similar to various other lodging houses operated in the City of New York, and that the action was being brought on behalf of the owner and operator of all such lodging houses, all of whom were similarly situated (fol. 15).

At the trial the appellant produced six witnesses. Only one of these witnesses was an officer of the appellant (fol. 224). This officer enumerated several so-called lodging houses which the appellant operated. All of these establishments were located within the City of New York and essentially all carried the word "Hotel" in their names (fols. 225, 226). The other five of the appellant's witnesses testified generally as to the operation of or as to his connection with a scattered number of lodging establishments. Again all of these lodging places were located within the City of New York and most of them were characterized by name as hotels (fols. 126, 132, 136, 140, 142, 194, 206, 213, 257, 260, 277, 282).

The appellee produced four witnesses whose testimony tended to contradict or to offset the evidence introduced by the appellant. Cross-examination of the appellant's witnesses also raised serious questions as to the competency and relevancy of their testimony. Furthermore, extensive records of the Labor Department (6 volumes), concerning the proceedings before the wage boards and the commissioner, leading to the promulgation of Mandatory Minimum Wage Orders Number 6 and Number 6-a, were introduced into evidence (fols. 367-372, 375, 379-385, 474).

In spite of the conflicting evidence and inferences arising from the proof, the appellant predicates it argument on certain testimony of its witnesses as though the assertions and the conclusions of these interested witnesses constituted established facts, were not disputed or reflected conditions applicable to all so-called lodging houses wherever located.

The proof produced by the appellee in a large measure not only contradicted or cast a cloud over the validity of these assertions, but it is indisputable that the testimony of the appellant's witnesses related to a small segment of the industry within the City of New York, whereas the statute being challenged and the minimum wage orders of the commissioner had statewide application, and the employers affected thereby were located throughout the state.

The testimony before the trial court disclosed that the appellant's establishment and similar establishments, including the well-known Mills Hotels, *were conducted solely for profit.* There is no suggestion in the proof that these establishments were operated in furtherance of any charitable or beneficient purposes (fols. 217-219, 282, 351, 352, 431). Patrons are crowded into small rooms and dormitories, and beds are offered for both day and night sleepers (fols. 167, 280).

Most of the testimony produced by the appellant was designed to show that its establishments, which it called lodging houses, were not hotels. The manifest purpose was to endeavor to circumvent the application to its establishments of the term "hotel industry", as defined in a series of minimum wage orders, promulgated by the appellee, to include "any establishment which, * * * offers lodging accommodations for hire to the public * * *".

The appellant's establishment did, and nowhere in the record is it denied, provide lodging accommodations for hire to the public.

Despite the protestation of the appellant that its so-called lodging houses were not hotels, these and like establishments held themselves out to be hotels and essentially were hotels. At any rate, it is undeniable that they patently constituted a segment of the hotel industry and reasonably and properly were incorporated within the definition thereof in the said minimum wage orders, not only as a matter of fact but to protect the wage standards

of women and of minors and to deter unfair competition to the prejudice of such standards.

The record demonstrated that in establishments similar to those operated by the appellant, namely the Mills Hotel, where women indisputably were employed, lodging could be procured for $.55 a night. The establishments were known as hotels (fols. 348, 352), and, like the appellant's so-called lodging house, the guests needed no baggage and the accommodations were solely for men (fol. 357).

A photograph of one of the plaintiff-appellant's "lodging houses", to wit: "Mascot Hotel" deplicts that it advertised rooms for hire (fols. 141, 213, 214, 225). The appellant's witnesses testified that the cubicles had doors and were called "rooms" and that some establishments in fact had rooms (fols. 236-238, 245, 260, 261). Mr. Epstein, an officer of the appellant, conceded on cross examination that, "We call them rooms at times" (fols. 236, 237).

In the same connection, it is significant that the Seamen's Church Institute of New York, which employed many women and which was known both as a lodging house and a hotel (fols. 297-299), in addition to having rooms for lodgers also maintained dormitories for that purpose (fols. 300, 303, 304, 307).

Another appellant's witness testified that he operated a "hotel" on the Bowery for men and women and did not "serve food" (fols. 204, 259, 266).

Mrs. Emilia Lazarro testified that she was employed as a chambermaid at the Gilbert Hotel located at Mulberry Street and the Bowery and that the Gilbert Hotel was known as a lodging house (fols. 195, 329-332, 339). Mr. Salvador Ruiz testified that he was employed by the Mills Hotel Chain and that the three hotels about which he specifically testified had rates which started at $.55 and went

up to $1.25 per day, were for men lodgers only, and employed women (fols. 344-360).

Thus, the record disclosed disputed and unresolved facts upon which the appellant is endeavoring to base its argument.

On the other hand, Section 662 of the Labor Law directs that there shall be no appeal from the decision of the Industrial Commissioner on a question of fact, and his findings and the wage boards findings enjoy the benefit of the presumption of regularity (p. 26, Appendix B hereto).

Commissioner of Buildings Regulations

In order to support its argument that women are forbidden to be employed in lodging houses in the City of New York, the appellant essentially relies upon a regulation governing the conduct and maintenance of lodging houses, promulgated by Bernard J. Gillroy, Commissioner, Department of buildings, of the City of New York.

The appellant has failed to advise the Court of the filing date thereof, or to print the entire regulation (a photostatic copy of which was handed up to the Court of Appeals at the time of the arguments in that Court without previous notice to the appellee).

This apparent prohibition was filed with the City Clerk on February 28, 1957, less than three months before the argument of the case in the Court of Appeals and many years after the institution of the action herein. (Appendix C hereto)

Although the appellant during the course of the appeal proceedings maintained that the previously dated regulations prohibited such employment, those regulations did not substantiate the appellant's contentions.

At any rate, the aforementioned 1957 regulation relates only to the City of New York and overtly can have no modifying or superseding effect on a State law enacted in 1944 or on minimum wage orders promulgated many years theretofore under long existing provisions of the Labor Law. Palpably, these laws and orders preempted the field.

Moreover, in view of the proof in the record, these regulations merely relate to and interject factual considerations which the Court of Appeals' opinion demonstrates would be matters for the consideration and action of another forum in the judicial system of the state under the provisions of Section 110 of the Labor Law, which the appellant had not invoked.

POINT I

No substantial federal question is presented under Point I of the jurisdictional statement.

The constitutional attack by the appellant is directed to the validity of a state statute, specifically Section 663-a of the Labor Law of the State of New York. That statute prohibits an adult male to be employed in an occupation at less than the minimum standards or rates fixed for women and minors in such occupation under a minimum wage order.

This statutory mandate simply is a prohibition which has been enacted by the Legislature of the State of New York under its police power in the public interest and which has a reasonable relation to the public health, morals and welfare. The necessity for the sanction and the evils to which it had been addressed expressly have been declared by the Legislature.

A public policy edict has been incorporated in the section:

"§ 663-a. SUPPLEMENTARY PROTECTION

To effectuate the aim of this article and to protect the minimum wage standards and rates provided for women and minors no male * * * (adult) * * * shall be employed * * *."

The "aim" of the article and the public policy thereof mainly are proclaimed in Section 650 of the Labor Law (quoted in Appendix B hereof) and Section 651 of the same statute reading as follows:

"§ 651. STATEMENT OF PUBLIC POLICY. It is the declared public policy of the state of New York that wo en and minors employed in any occupation should receive wages sufficient to provide adequate maintenance and to protect their health."

Section 663-a was enacted to protect the minimum wage standards fixed for women and minors by preventing a lowering of such standards by unscrupulous or overreaching employers. The statute does not prescribe and does not pretend to establish a minimum wage for men and therefore the needs of men and an opportunity for men or for their employers to be heard have no relevancy whatever.

It is evident that the Legislature by enacting Article 19 of the Labor Law was not dividing men and women into two competing classes—male and female, as the appellant seemingly suggests constitutionally must be done, and was not treating their needs and rights separately and encouraging wage competition between the sexes. The contrary intention is manifest by the grouping of minors (male and female) with women in Article 19 and by the

terms of Section 650 thereof. Economically, it is common knowledge and the Legislature has so declared (§ 650) that women and minors were not as a class on a level of equality in bargaining with employers in regard to minimum wage standards.

It is obvious that the Legislature, by refusing for many years to enact a minimum wage law for men, has considered that no substantial evils have existed which would demand the establishment of minimum wages for men and that the needs of men required no legislation of that character. Clearly, in that sense the Legislature has considered the needs of men.

At the same time, however, the Legislature recognized as paramount the need for the protection of the minimum wage standards set for women and minors against unfair competition by reason of the employment of men in an industry at a wage less than the minimum wage ordered for women and minors. The public policy involved in such a legislative interest is illustrated by the succinct statement in *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 [1937]: "• • • What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers?" (p. 398).

Moreover, it is apparent that the minimum wage laws and their salutary purpose, as they concern a specific industry, could be vitiated by the simple expedient of employing only men in an establishment.

The Court of Appeals in its opinion for affirmance epitomized the legislative intention and consideration of the inherent problems:

> "The idea back of section 663-a is plain enough. The Legislature, intent on providing wage and hour protection for employed women and minors, realized that this objective could not be realized if men work-

ers could take the same jobs at wages lower than those set for women and children. If that kind of wage competition between men and women were not eliminated the result of a minimum wage order for women might be that their last state would be worse than their first. They would be out of jobs. Thus, section 663-a, although it deals directly with wages of men rather than of women, has a reasonable relation to the enforcement of the general policy of protecting women and minors in industry. * * *"

* * * * *

"* * * Then the board and the Commissioner from the testimony at these hearings determined what would be a proper minimum wage for women in the industry. That wage was by the statute's own command made applicable, however, as a minimum for men working in the same occupation. Surely, the Legislature could take notice that the needs of men for maintenance and health are not less than that of women and that the value of the services of men and the wages ordinarily paid to men in a given industry are not less than those of women."

The due process clause is not to be so broadly construed that Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare (*Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U. S. 525 [1949]).

Every legislative enactment carries a strong presumption of constitutionality including a rebuttal presumption of the existence of necessary factual support for its provisions (*Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194 [1934]). If any state of facts, known or to be assumed, justify the law, the court's power of inquiry ends. (*United*

States v. *Carolene Products Co.*, 304 U. S. 144 [1938]). Courts strike down statutes only as a last resort (*Ahern* v. *South Buffalo Ry. Co.*, 303 N. Y. 545 [1952], aff'd 344 U. S. 367 [1953]), and only when unconstitutionality is shown beyond a reasonable doubt (*Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61 [1910]; *Matter of Fay*, 291 N. Y. 198 [1943]). A law reasonably related and applied to some actual and manifest evil, not arbitrary or unreasonable, satisfies the demands of due process (*Matter of Jacobs*, 98 N. Y. 98 [1885]; *Fisher Co.* v. *Woods*, 187 N. Y. 90 [1907]; *Nebbia* v. *People of State of N. Y.*, 291 U. S. 502 [1934]).

Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community (*Chicago, Burlington & Quincy R. Co.* v. *McGuire*, 219 U. S. 549 [1910]). In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression (*Chicago, Burlington & Quincy R. Co.* v. *McGuire*, *supra*; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 [1937]).

A particular classification is not invalidated by the Fourteenth Amendment merely because inequality actually results. Every classification of persons or things for regulation by law produces inequality in some degree; but the law is not thereby rendered invalid (*Atchison, Topeka Railroad* v. *Mathews*, 174 U. S. 96 [1898]), unless the inequality produced be actually and palpably unreasonable and arbitrary (*Arkansas Natural Gas Co.* v. *Railroad Comm.*, 261 U. S. 379 [1923]; *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422 [1936]).

If a statute is in the public interest, even if it does restrain competition, then it is a proper exercise of the

police power (*Carolene Products Co.* v. *United States*, 323 U. S. 18 [1944]; *Hegeman Farms Corporation* v. *Baldwin*, 293 U. S. 163 [1934]; *H. P. Hood and Sons* v. *Dumond*, 366 U. S. 525 [1949]; *Nebbia* v. *People of State of New York*, 291 U. S. 502 [1934]).

"• • • No case that we recall illustrates more aptly or forcibly the wisdom of the familiar rule, expressed by this court in a recent case in these terms: 'There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds.' *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 157". • • • (*Ward* v. *Krinsky*, 259 U. S. 503, 521 [1921].)

"• • • Nor can we declare the provisions void because it might seem to us that they enforce an objectionable policy or inflict hardship in particular instances. • • •" (*Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422, 428 [1935].)

The appellant appears to recognize the unsubstantial nature of the issue when it states:

> 'In passing it might be observed that Section 663-a seems singularly pointless. Men are ordinarily paid more than women, even for similar work. That fact is implicit in the 'Factual Background' of the Law. • • •"
> (p. 12, Jurisdictional Statement).

Governor Lehman's veto of an earlier proposed enactment emphasizes the consideration and care which the Legislature obviously exercised later, in 1944, by enacting Section 663-a. It demonstrates the conviction of the Legislature that evils continued to exist which needed statutory treatment. The Governor's veto memorandum principally

criticized the fact that the act was to take effect immediately thereby automatically making criminals of persons who had not theretofore adopted the wage scale, and afford ing industries no opportunity to be heard. These objectional aspects were overcome in the later legislation which afforded ample opportunity for readjustment. The Bill Jacket Collection of The New York State Library contains letters or memoranda of approval of the 1944 legislation, addressed to the Governor or his counsel, by the Committee on State Legislation of the New York County Lawyers Association, the Industrial Commissioner, the Honorables Irving M. Ives and Jane H. Todd, the Congress of Industrial Organizations and the Citizens Union of the City of New York.

POINT II

The purported questions raised in Points II, III and IV of the Jurisdictional Statement involve no substantial federal questions; are founded in certain respects on conflicting facts unresolved in the action; concern state statutes already construed by the state courts unfettered by constitutional implications; relate to matters within the jurisdiction of other state forums; or, were not properly before the Court of Appeals and were not considered.

The appellant's contention under Point II of the Jurisdictional statement that no provision is incorporated in Section 663-a for the granting of a special license to an aged or handicapped adult man, as a special license under like circumstances may be granted to a woman or a minor, concerns merely the construction of the provisions of Section 663-a in connection with other provisions of the Labor Law. Jurisdiction to interpret the legislative intention was vested in the state courts and the Court of Appeals has established that intent by its determination.

The appellant notes that "the point was argued in the Court below", and that such licenses had been issued to handicapped men (p. 18, Jurisdictional Statement). However, the Court of Appeals apparently considered the appellant's point as unworthy of a comment in its opinion for affirmance. The appellant sought to have the Court of Appeals amend its remittitur to show that the Court had considered and passed upon this question as a constitutional issue, but the effort was unsuccessful. (Appendix D, hereto)

The question is unsubstantial, concerns state statutory construction procedure and embodies no constitutional aspects. An interpretation upholding the constitutionality of an act is to be favored (*United States ex rel., etc.* v. *Delaware & Hudson Company*, 213 U. S. 366 [1908]).

The alleged questions raised by the appellant under Points III and IV also concern statutory construction by the state court; are based on unresolved issues of fact; were not presented to or considered by the proper judicial forum prescribed by the laws of the state; or, were not duly before the Court of Appeals for consideration and were not considered. The following observations by the Court of Appeals in its opinion is illustrative:

> "Elsewhere in its brief appellant argues that this minimum wage order is unconstitutional as applied by the Commissioner to lodging houses like plaintiff's since, in fact, no women are employed in those places. But as to that plaintiff, in bringing this suit, has invoked the wrong forum. Section 662 of the Labor Law (part of art. 19) says that such wage orders may be reviewed by the Board of Standards and Appeals as provided in section 110 of the Labor Law. * * *"
>
> * * * * *
>
> "As indicated above we do not reach, in a suit like this, the questions (aside from unconstitutionality of

section 663-a) of invalidity or unreasonableness of the application of this order to plaintiff's lodging houses. If we were to reach any such questions we would say that the orders are not invalid at the point where they include these lodging houses as "hotels". • • •"

CONCLUSION

It is respectfully submitted that the Jurisdictional Statement of the appellant presents no questions sufficiently substantial to warrant a review by this Court of the judgment below, and the appeal should be dismissed or the judgment affirmed.

Dated: December 9, 1957.

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JOHN R. DAVISON,
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APPENDIX A

Background of Minimum Wage Legislation

In 1933, a United States Supreme Court decision (*Adkins, et al.* v. *Children's Hospital of the District of Columbia,* 261 U. S. 525 [1923]), stood as a bar to minimum wage regulation. In that case, a women's minimum wage statute of the District of Columbia which provided that the minimum wage should be established by the statutory board at levels which would adequately supply "the necessary cost of living to any such women workers to maintain them in good health and to protect their morals", was held to be unconstitutional.

In 1937, the United States Supreme Court expressly overruled the *Adkins* case, *supra,* and upheld the minimum wage law for women enacted by the State of Washington The court found that the law was a reasonable exercise of the state's police power to protect the health of women, to guard them against unscrupulous employers and to correct the abuse of casting a direct burden on the community for the support of women who were denied a living wage (*West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379 [1937]).

New York State's first minimum wage legislation was enacted in 1933 as Article 19 of the Labor Law (L. 1933, c. 584). It was entitled "Minimum Fair Wage Standards for Women and Minors" and provided that the determination of the minimum wage should be based upon a consideration of both "the fair and reasonable value of the services rendered" and an amount "sufficient to meet the minimum cost of living necessary for health". The article was drafted to meet the constitutional objections of the *Adkins* case, *supra,* but the statute was held to be unconstitutional (*People of the State of N. Y. ex rel. Tipaldo* v. *Morehead,* 270 N. Y. 233 [1936], *Morehead* v. *People of the State of New York ex rel. Tipaldo,* 298 U. S. 587 [1936]).

Appendix A.

Soon after the decision in the *Parrish* case, *supra*, New York State again added a new Article 19 to the Labor Law, entitled "Minimum Wage Standards for Women and Minors", which became effective on April 27, 1937. Its constitutionality was upheld in *People of the State of New York* v. *Beck*, 288 N. Y. 569 [1942], *Beck* v. *People of the State of New York*, cert. den. 317 U. S. 696 [1943]; and *Mary Lincoln Candies, Inc. et al.* v. *Department of Labor of the State of New York*, 289 N. Y. 262 [1942]; 290 N. Y. 760 [1943].

In 1938, Congress adopted the fair labor standards act which prescribed a minimum wage for all employees, male and female, who were engaged in interstate commerce and were engaged in the production of goods for interstate commerce. This law was held to be constitutional in the case of *U. S.* v. *Darby*, 312 U. S. 100 (1941).

To date, there are at least thirty states and territories which have minimum wage laws (See Commerce Clearing House Lab. L. Report 4). Of these minimum wage statutes, at least seven include men in their coverage. A minimum wage statute applicable to both men and women has been held to be constitutional (*West* v. *Egan*, 18 Conn. Super. 447 [1954].

APPENDIX B

Pertinent Statutes and Minimum Wage Orders

In 1944, in order to effectuate the aim of the aforementioned Article 19 of the New York State Labor Law and to protect the minimum wage standards and rates provided for women and minors, the Legislature enacted a new section which was numbered 563-a and was entitled "Supplementary protection" (L. 1944, c. 792, effective July 1, 1944). In 1948, it was renumbered as Section 663-a and otherwise amended without substantial change (L. 1948, c. 353, effective July 1, 1948).* The appellant has addressed its challenge to this section.

> "§ 663-a. SUPPLEMENTARY PROTECTION. To effectuate the aim of this article and to protect the minimum wage standards and rates provided for women and minors, no male twenty-one years of age or over shall be employed in an occupation at less than the minimum standards or rates of wages fixed for women and minors in such occupation under a minimum wage order. The provisions of sections six hundred sixty, six hundred sixty-two, six hundred sixty-three, six hundred sixty-four, and six hundred sixty-five of this article shall apply to any employer or his agent, or officer or agent of any corporation failing to comply with the provisions of this section or any minimum wage order."

Minimum wage standards for women and minors were established in New York State in 1937, by the addition of Article 19 to the Labor Law (L. 1937, c. 276, effective April 27, 1937). This article is commonly characterized

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* In addition to renumbering, the section was amended by omitting the words "directory or mandatory" preceding "minimum wage order" in the first sentence.

as the "Minimum Wage Law". The Legislature recognized the need for such legislation and incorporated a factual background in the statute. Section 650, formerly section 550, of the Labor Law, enunciates this background:

> "§ 650. FACTUAL BACKGROUND. Women and minors are employed in some occupations in the state of New York for wages insufficient to provide adequate maintenance and to protect health and unreasonably low and not fairly commensurate with the value of the services rendered. Such a condition is contrary to public interest and public policy commands its regulation. Women and minors employed in such occupations are not as a class on a level of equality in bargaining with their employers in regard to minimum wage standards, and 'freedom of contract' as applied to their relations with their employers is illusory. Judged by any reasonable standard, wages in such occupations are often found to be insufficient to provide adequate maintenance and to protect health and to bear no relation to the fair value of the services rendered. Women and minors employed for gain in such occupations are peculiarly subject to the overreaching of inefficient, harsh or ignorant employers and under unregulated competition where no adequate machinery exists for the effective regulation and maintenance of minimum wage standards, such as exist tend to be set by the least conscionable employers. In the absence of any effective minimum wage rates for women and minors, the constant lowering of wages by unscrupulous employers constitutes a serious form of unfair competition against other employers and employees, reduces the purchasing power of the workers, threatens the stability of industry and in many instances requires such wages to be supplemented by the payment of public moneys for

relief or other public assistance. The evils of oppressive, unreasonable and unfair wages as they affect women and minors employed in the state of New York are contrary to public policy and are such as to render imperative the reasonable exercise of the police power of the state to secure wages sufficient to provide adequate maintenance and to protect the health of women and minors; and to protect the public interest of the community at large in their health and well-being, as well as for the protection of trade and industry."

The public policy of the State of New York is declared in Section 651 of the Labor Law:

"§ 651. STATEMENT OF PUBLIC POLICY. It is the declared public policy of the state of New York that women and minors employed in any occupation should receive wages sufficient to provide adequate maintenance and to protect their health."

Section 652, subdivision 6, of the Labor Law, defines "occupation" as follows:

"6. 'Occupation' shall mean in industry, trade, business or class of work in which women or minors are gainfully employed, but shall not include domestic service in the home of the employer or labor on a farm."

The Industrial Commissioner of the State of New York is empowered to establish minimum wage rates as circumstances warrant in "any occupation or occupations" as defined in Section 652, subdivision 6, of the statute (§§ 654, 656, 657).

The procedure for establishing minimum wage orders by the Industrial Commissioner is outlined in Article 19.

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The Industrial Commissioner is authorized to make minimum wage orders defining minimum wage rates in an "occupation or occupations" (§ 657). Such orders are promulgated after preliminary investigation and with the aid of a wage board appointed by him, to make an investigation of any occupation or occupations (§ 654). The functions and powers of wage boards are outlined in Sections 656 and 657. Section 656 provides that a wage board may classify employments in any occupation or occupations, according to the nature of the services rendered, and may recommend scales of wage rates for different grades of employees in any occupation or occupations.

Since the enactment of the statute, the Industrial Commissioner has implemented it by promulgating wage orders for various industries as follows: Laundry, beauty service, confectionery, cleaning and dyeing, restaurant, hotel, retail trade, amusement and recreation, building service, and counselor staff—occupation—children's camps.

The procedure fixed in the statute for establishing a minimum wage order was followed by the Industrial Commissioner (fols. 367-384), when Mandatory Minimum Wage Order Number 6, effective July 17, 1944, was promulgated for the hotel industry (Exhibit 3; fols. 443, 474). Section 563-a, now Section 663-a (supplementary protection), then was in effect. The legislation had been approved by the Governor on April 14, 1944 with an effective date of July 1, 1944.

"Hotel Industry" was defined in Mandatory Minimum Wage Order Number 6 as:

> "The term 'hotel industry' includes any establishment which, as a whole or part of its business or activities, *offers lodging accommodations for hire to the public*, to employees, or to members or guests of members." (Emphasis supplied)

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The Order excluded from the term "hotel industry" establishments in which lodging accommodation was not available to the public, or to members or to guests of members, but was incidental to instruction, medical care, religious observances, or to care of handicapped or destitute persons or other public charges.

In the posters and other material distributed under this Order, notice was widely disseminated relative to the enactment of Section 663-a and its effect (fols. 443, 445, 455).

In 1947, Mandatory Minimum Wage Order Number 6-a, effective November 30, 1947, was promulgated for the hotel industry (Exhibit 7; fols. 445, 474) in accordance with regular statutory procedure (fols. 367-384). "Hotel Industry" was defined in this Order as:

> "The term 'hotel industry' includes any establishment which, as a whole or part of its business activities, *offers lodging accommodations for hire to the public*, to employees, or to members or guests of members, and services in connection therewith or incidental thereto." (Emphasis supplied)

This Order excluded from the term "hotel industry" eating or drinking places customarily offering lodging accommodations of less than five rooms to the public, to employees, or to members or guests of members, and establishments in which lodging accommodation was not available to the public, or to members or to guests of members, but was incidental to instruction, medical care, religious observance, or to the cases of handicapped or destitute persons or other public charges.

In the posters and other publications circulated under this order, notice was given that no male under twenty-one years of age or over "may be paid less than the rates fixed for women and minors." (fols. 443, 445, 455).

Appendix B.

On December 6, 1946, upon the appointment of a new minimum wage board, certain modifications were proposed. After due notice and hearings, the report submitted to the Industrial Commissioner was formally approved by him on September 19, 1947 resulting in the present Mandatory Minimum Wage Order Number 6-a.

Prior to the time that Mandatory Minimum Wage Order Number 6, became mandatory, it was known as "Directory Order Number 6", and had been in force for three years. In order to avoid the abuses which had arisen because men were paid less wages than women in those industries in which wage orders were in effect, the Legislature enacted the "supplementary protection" Section 663-a (L. 1944, c. 792, effective July 1, 1944; Amended by L. 1948, c. 353, effective July 1, 1948).

Since the enactment of Section 663-a, Mandatory Minimum Wage Orders Number 6 and Number 6-a became effective on July 17, 1944 and November 30, 1947, respectively, followed by Mandatory Minimum Wage Order Number 6-b, effective February 15, 1953, and Mandatory Minimum Wage Order Number 6-c, effective October 11, 1954. The last mentioned order defines "hotel industry" as including "any establishment which, as a whole or part of its business activities offers lodging accommodations for hire to the public, to employees, or to members or guests of members, and services in connection therewith or incidental thereto. The industry includes but is not limited to commercial hotels, apartment hotels, resort hotels, *lodging houses*, boarding houses, furnished room houses, children's camps, adult camps, tourist camps, tourist homes, auto camps, residence clubs, membership clubs, dude ranches, Turkish baths and Russian baths" (Emphasis supplied).

The exclusions from the term "hotel industry" in Order Number 6-C were the same as Mandatory Minimum Wage Order Number 6-a.

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Recently, the hotel industry minimum wage board held public hearings prior to recommending new minimum wage rates. A notice dated February 7, 1957, signed by the chairman of the Hotel Industry Minimum Wage Board, announced hearings pursuant to Section 656 of the Labor Law. On January 13, 1958, a new order Number 6-d will become effective.

Section 662 of the Labor Law decreed as follows:

"§ 662. REVIEW OF ORDERS.

All questions of fact arising under this article except as otherwise herein provided shall be decided by the commissioner and there shall be *no appeal from his decision on any such question of fact*, but there shall be a right of review by the board of standards and appeals as provided in section one hundred and ten, article three of the labor law. Appeals from the determination of the board of standards and appeals shall be taken direct to the appellate division of the supreme court, *third* judicial department *on any question of law* included or embodied in any decision or order thus reviewed." (Emphasis supplied.)

It is plain that the Legislature intended by the terms of this section that all questions of fact decided by the Industrial Commissioner were to be final and no appeal therefrom was to be authorized, subject however, to a review as therein provided by the Board of Standards and Appeals. It is clearly mandated therein that questions of law likewise were to be reviewed in accordance with the same procedure and that an appeal in relation thereto was to be taken to the Appellate Division of the *Third* Judicial Department. It is also equally clear that the Legislature intended this procedure to be exclusive.

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Pertinent portions of Section 110 read as follows:

§ 110. REVIEW BY BOARD OF STANDARDS AND APPEALS

"1. Any person in interest or his duly authorized agent may petition the board of standards and appeals for a review of the *validity* or reasonableness of any rule or order made under the provisions of this chapter.

"2. The petition shall be verified, * * *. The filing of such petition shall operate to *stay* all proceedings against the petitioner under such review or order until the determination of such review.

* * * *

"4. If the board finds that the rule or order is *invalid* or unreasonable it shall revoke or amend the same." (Emphasis supplied.)

The following quoted provisions of Sections 111 and 112 reflect the intention of the Legislature that any action to determine the validity and reasonableness of an order first must be reviewed by the Board of Standards and Appeals:

"§ 111. REVIEW BY COURT

"1. Any person in interest may bring an action in the supreme court against the department to determine the *validity* and reasonableness of any provision of this chapter or of the rules made in pursuance thereof or of any order directing compliance therewith, *provided that no such action* to determine the *validity* and reasonableness of any rule or *order shall be brought except as an appeal from the determination of the board as provided in section one hundred and ten.* * * *" (Emphasis supplied.)

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§ 112. LIMITED REVIEW OF PROVISIONS OF CHAPTER AND OF RULES AND ORDERS

"1. Every provision of this chapter and of the rules made in pursuance thereof, and every *order* directing compliance therewith, shall be *valid unless declared invalid* in a proceeding *brought under the provisions of section one hundred and ten. Except as provided in section one hundred and eleven, no court shall have jurisdiction to review or annul any such provision or order or to restrain or interfere with its enforcement.*

"2. Every such provision, rule or order shall in a prosecution or action to impose a penalty for its violation be *deemed valid* unless prior thereto such provision, rule or order has been *revoked or modified* by the *board* or annulled by a *court pursuant to section one hundred and ten and one hundred and eleven,* or unless such proceeding is pending, in which case the prosecution or action shall be stayed by the court pending the final determination thereof. * * *" (Emphasis supplied.)

APPENDIX C

Regulation of New York City Department of Buildings

REGULATIONS GOVERNING

Coduct and Maintenance of Lodging Houses

(Filed with City Clerk February 28, 1957)

By virtue of the authority vested in the Commissioner of Buildings under provisions of Section 885 of the New York City Charter and Section 4, Subdivision (e), Paragraph (4) of the regulations of the department relating to Regulations Governing Conduct and Maintenance of Lodging Houses, is hereby amended, effective Mareh 1, 1957, to read as follows:

Section 4, Subdivision (e), Paragraph (4).

Only servants at work or lodgers accommodated as per paragraph (3) of this subdivision, shall be allowed in sleeping rooms during the four-hour period for airing, as specified in the permit issued for such lodging house. In any lodging house in which accommodations are provided for male lodgers, no female servants shall be employed; likewise, where accommodations are provided for female lodgers, no male servants shall be employed.

BERNARD J. GILLROY, Commissioner,
Department of Buildings.

APPENDIX D

Extract From Affidavit of Henry Alexander, Attorney for Appellant, Attached to Motion Addressed to the Court of Appeals for Amendment of the Remittitur.

"We urge that the amended remittitur show that upon the appeal plaintiff-appellant contended:

"1. • • •

"2. That Article 19 of the Labor Law was repugnant to the Fourteenth Amendment to the Constitution of the United States in that it contained a provision (Section 658 of the Labor Law) authorizing special licenses for women and children in cases of impaired earning capacity permitting employment at less than the minimum wages fixed according to law and no like provision was contained in the law concerning men, yet Section 663-a of said Article 19 forbade the employment of men in any occupation at less than the minimum wages fixed for women and minors in such occupation.

"3. • • •

"4. • • •"